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Lee for Appellees

In the Supreme Court of U. S.

No. 171.

On Docket of the Adjourned April Term, 1867.

WILLIAM SLATER AND OTHERS, COMPLAINANTS AND APPELLANTS

vs.

LEWIS MAXWELL.

ABSTRACT AND POINTS OF APPELLANT.

WM. F. FRICK,

For Appellant.

MURPHY & Co. Printers and Catholic Booksellers, 182 Baltimore street, Baltimore.

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THIS is an Appeal from the District Court of the United States, for the Western District of Virginia, sitting in Equity.

The original Bill in the cause (page 1 of printed record) was filed in the month of April, 1852, by William Slater, alleging that he was a citizen of the State of Maryland; and that on the first day of April, 1840, he purchased from Henry O. Middleton of the State of Virginia, 19,944 acres of land, consisting of several parcels, but all lying in Ritchie County, within the Western Judicial District of that State; that said lands were returned delinquent by the Sheriff of Ritchie County for the non-payment of taxes thereon for the years 1841-2-3-4, amounting in all to the sum of $30.03; that the said Sheriff, on the 7th day of October, 1845, exposed for sale the whole of the aforesaid 19,944 acres, to satisfy said sum, and actually sold

the whole to Lewis Maxwell, a citizen of the State of Virginia, for the paltry sum of $30.03; that at the time of said sale, the county of Doddridge had been created by an act passed 4th January, 1845, and included within its boundaries 11,943 acres of the land sold, the residue of the lands, amounting to 8,001 acres, remaining within the boundaries of Ritchie County; that the Clerk of the County Court of Ritchie County, on the 27th October, 1847, conveyed to Maxwell the first-named parcel, the deed for which was recorded in Doddridge County, and on the same day conveyed to him the second-named parcel, the deed for which was recorded in Ritchie County; that by means of these conveyances, Maxwell, by the payment of the inconsiderable sum of $30.03, became ostensibly the owner of 19,944 acres of land, for which the Complainant had paid to Middleton the sum of $3,043.00; that, in fact, the Complainant had sold and conveyed, on the 1st day of August, 1840, to William L. Hopkins and James Moir, of the city of Baltimore, 7,955 acres of said lands, so that at the time of said sale he was the owner of only 12,039 acres; that Maxwell, Hopkins and Moir, as the Complainant had understood, had made some arrangement between them, whereby Maxwell had released to Moir and Hopkins his purchase of their land.

The Bill further charges, that at the time of the said sale the land sold was worth, at the least, fifty cents per acre, so that the twelve thousand acres owned by the Complainant were of the value of $6,000. He insists that a small portion of said lands, not exceeding two hundred acres of the least valuable portion thereof, would have sold for a sum sufficient to pay the taxes and damages thereon then due to the Commonwealth; that the Act of Assembly which authorized the Sheriff to sell said lands, gave him power to sell only so much thereof as was sufficient to pay said taxes and damages, and that the sale of the whole was such an abuse of authority, to the injury of the Complainant, as would authorize and require a Court of Equity to set aside the proceedings of the Sheriff, upon equitable terms; that the Sheriff fraudulently combined with Maxwell to enable the latter to pur-

chase the lands at a grossly inadequate price — so gross as to be fraudulent as to the Complainant, and against which a Court of Equity would relieve him; that the Complainant had offered to refund to Maxwell the money he had so paid for said land, with all costs and expenses incurred by him in relation thereto, if he would surrender his claim to the land, but that he had refused to do so; that Maxwell obstinately insisted, that the extraordinary sale so made to him had divested the Complainant of his right to said land, and vested the same in him, beyond the power of a court of law or equity.

The Bill further charges, that at the time the lands aforesaid were offered for sale by the Sheriff, a great many persons were present, with a view to purchase small tracts for farming purposes, had the lands been offered for sale in that way, but that Maxwell stated to the by-standers that he was an authorized agent to buy in the said land for the Complainant, and in this way he put down all competition and bidding for the said land, and was thus enabled to have the whole knocked off to him for the amount of the taxes; that this conduct was pursued by Maxwell to enable him to buy, without competition, all the lands of the Complainant for a song, and that he did, by such means, accomplish his designs; that this conduct on the part of Maxwell was fraudulent as to the Complainant, and that a Court of Equity ought to compel him to yield up a claim acquired under such circumstances. And the Complainant insists, that Maxwell ought to be decreed to release to the Complainant whatever right he had acquired in the Complainant's lands, under said sale, on receiving from the Complainant the money paid by him on account of the taxes, together with any proper costs and charges he might have incurred in the care and management of the land since his purchase. And here follows the usual prayer for Maxwell to answer, and for further and general relief, etc.

The answer of Maxwell (page 4 of printed record) states, that on the 7th October, 1845, at a sale of delinquent land, in Ritchie County, he did purchase, for the sum of $31.53, 19,944 acres,

listed in the name of William Slater. He denies that the Sheriff who made the sale exceeded his authority; and he says that the Sheriff offered to sell a part of each tract first, and failing to get a bid, he then offered the whole tract and sold it; but failing to get a bid for the whole tract, struck it off to the Commonwealth. He denies, also, the charge that the Sheriff combined with him and made a fraudulent sale; and the charge, that he stated to the by-standers that he was an authorized agent to buy said tract of 19,944 acres for the Complainant, *is believed by him to be untrue;* that he did not consider the tract of land to be worth, in 1845, fifty cents per acre. And in reply to the charge that said land was sold for an inadequate price, he says, that he bid more than any other person; that the land sold at as high a rate as other lands at the same sale; that to set aside such sales for inadequacy of price, would be calculated to discourage sales hereafter, and to open the door to unjust speculation at the expense of those who have fairly purchased lands at such sales, etc., etc.

In June, 1857, under leave of the Court, the Complainant filed an amended Bill. (See printed Record, page 6.) It is identical with the original Bill, except in one averment only. The charge in the original bill, that Maxwell stated to the by-standers "that he was an authorized agent to buy the land for the Complainant," is omitted; and, in lieu of it, the averment is inserted, (p. 8,) that Maxwell's statement to the by-standers was, "*that the Complainant would redeem the land from the purchaser;*" and the same charges are made as in the original bill in reference to the motive and effect of this representation, in putting down competition, and enabling Maxwell to accomplish his fraudulent design, of buying the lands for a song.

Maxwell having failed to answer this amended Bill, under the rules, there was a decree *pro confesso* against him; but he subsequently filed an answer, (p. 9,) in which he says: "That he has no recollection of making the statement as averred, *nor does he believe* that he stated that *William Slater* would redeem his land.

He believes the charge to be untrue." And in his affidavit to his answer, he also qualifies his oath, by swearing that the same is true, *as he believes.*

A general Replication was filed to the answers.

Before the cause was heard, on these pleadings, various proofs were taken on both sides; the substance of all of which, so far as they have any bearing on the issues, is as follows: A number of witnesses were examined by the Complainant, all of whom testified, positively, that the Slater lands, when sold by the Sheriff in 1845, were worth fifty cents per acre. Asa Bee, (p. 16,) Zebulon Bee, (p. 16,) Joseph M. Wilson, (p. 17,) Jonathan C. Louther, (p. 17,) Quilly M. Zinn, (p. 19,) and Asa Bee and Zebulon Bee, whose testimony, for some reason, was twice taken, (p. 20,) all of them prove this fact. Louther puts the value of some of the lands at sixty-two and one-half cents per acre, and states that to have been the average value of the unimproved lands in that region of country at the time of the sale. Each one of these witnesses was also separately asked the question, how many acres of the Slater lands it was necessary to sell, at that time, to produce forty dollars. Three of the witnesses say eighty acres, one of them seventy-five, and the other one hundred acres. These witnesses, on cross-examination, were only asked what the value of said lands would be, in 1845, taking a *quit-claim* Deed; and the general answer was, about twenty-five cents per acre.

There is not a particle of testimony taken in the cause, to countervail this proof. It may therefore be regarded as conclusively established by the evidence, that the twelve thousand acres of Slater, (being about two-thirds of the land sold to Maxwell for $30,) were actually worth at the time of sale, $6000; and that a sale of one hundred acres, at the most, if properly made, would have yielded $40 at that time. Not one of the witnesses seems to have regarded the question, what the tract assessed to Slater, would have brought under a *quit-claim* Deed from him, as affecting the price at which the Sheriff might have

sold a small parcel of the land. Wilson, (p. 17,) and Zinn, (p. 19,) were both *present at the sales*, and the first says "at the time of sale, I think one hundred acres, if sold separately, would have brought $40;" and the other says that "eighty acres, if sold separately, would have yielded $40."

By way of explanation, why the entire tract of 19,944 acres was knocked off to Maxwell, at the amount of the taxes, $30.03 with $1.50 added for the Sheriff's five per cent. commission, making $31.53; and in support of the averment of the Bill, that Maxwell's fraudulent representations had prevented any competition, two witnesses were examined by the Complainant.

Quilly M. Zinn, (p. 19,) states that "he was present at the sale "of said land, called the Slater land, when the Sheriff was cry-"ing it; and Louis Maxwell stepped up, and said he knew *the* "*owners*, and *it was not worth while for any person to buy it*, that "they would pay the taxes." Being asked, on cross-examination, by Maxwell himself, whether he was certain and positive that those words were used, he answers "*I am.*" He further answers, that he recollected Spencer T. Bukey being by, when the statement was made. And in answer to a further cross-question by Maxwell *himself*, whether "*he, the Defendant, might not have alluded to some of the tracts, lying in the Slater connexion?*" His reply is, "The Defendant might have alluded to those tracts, or he might not. *They were crying the Slater land*, at the time he stepped up and made the observations."

The statements of this witness were corroborated by another, James R. Jones, (p. 23.) He states that he was present at the sale. In answer to a question whether he heard the Defendant Maxwell make any statements, at the time the Sheriff was engaged in selling the lands charged in the name of Slater, he replies, "Mr. Maxwell, S. T. Bukey, and Manly Zinn, were "present, Mr. Zinn appeared like as if he wanted some of the "land. Mr. Maxwell said he knew the men, *and it was no* "*use for them to bid*, that it would be redeemed. I understood

"Mr. Maxwell to mean by—*the owner of the land.*" A cross-examination of this witness elicited no variation from this statement.

There was also some *direct* testimony to the point, that these fraudulent representations of Maxwell had the effect of preventing competition with him, in the purchase.

In reply to a question whether any other person would have bid on the Slater land, if Maxwell had not made the representations he did, in relation to its being redeemed, Jones says, (p. 24.) "It appeared to me that Mr. Bukey and Mr. Zinn were going to "bid; *they said they were going to bid on the Slater land.*" An attempt was also made, on the cross-examination of this witness, (as on that of Zinn,) to show that Maxwell's representations referred to some other tracts "*lying in the Slater connexion*" and that Bukey and Zinn might have wished to buy some of those other tracts: but the witness was as positive as Zinn, in his recollection: and in reply to a question "Did you hear Spencer Bukey or Manly Zinn say that they wished to buy any other tract than the Slater tract, he answers "No, sir, I did not:" and to a further question, did Manly Zinn tell you why it was, he wanted to bid for the Slater tract, and not for the Stillinger tract, or any other tract, he answers, "He did not; *only he said he would like to have some of the Slater land.*" It is also proved by this and other witnesses, that Mr. Bukey was dead at the time of the evidence being taken.

It is also proved by the Complainant, by way of explanation of the meaning of Maxwell's questions about other tracts "lying in the Slater connexion:" and as pregnant circumstances, tend to establish the fraudulent character of his proceedings, at said sale, by Elijah Taylor, (p. 22.) That a Company had been formed for the purchase of some 52,000 acres of land in Western Virginia. That the Deponent and *William Slater*, and John and Abraham Kerr, and R. & J. Smith and others, all residing in Baltimore, were members of this Company: and that

the other member, (being the only one who resided near the lands,) was *Louis Maxwell, the Defendant.* And a fuller explanation of the precise character of this Company, and of the interests of the respective members thereof, will be found in the deposition of Henry O. Middleton, (p. 28,) who states that he is the person who made the contract with sundry persons for the sale to them of about 48,000 acres in Ritchie county, on the South Fork of Hughes River: and that the persons who purchased were, Moir & Hopkins, 20,000 acres, Elijah Taylor, 8,000 acres, John & James Herr, 4,000 acres, *Louis Maxwell*, 4,000 acres, two men by the name of Smith, 4,000 acres, Jasper Weaver, 4,000 acres, David Stuart, 2,000 acres, and Michael Stillinger, 2,000 acres, and that, when the lands came to be conveyed by him, Jasper Weaver's share was conveyed to Adam Weaver, by request, and Moir & Hopkins' 20,000 acres, by request, to *William Slater*, the purchasers having had the lands laid off into separate Tracts, and drawn lots for them. And it will also appear from the Sheriff's return of the sales made by him, (p. 48,) that not only Slater's share of the lands in this Company were sold, but also the Smiths' share, 4,000 acres, David Stuart's share, 2,000 acres, and John or James Herr's share, 1,997 acres; and that on each and all of these cases *Louis Maxwell* was the purchaser of the entire tracts, at the paltry amount of taxes with which they were charged.

It is also shown by the copy of the Deed from Slater to Moir & Hopkins, (p. 32,) dated August 1, 1840, that Slater had, prior to the sale, conveyed to Moir & Hopkins, 7,956 acres of the 19,944, with which he was charged; and this is the tract of 'James Moir & James Hopkins' referred to, as 'belonging to the Slater connexion of land,' in Maxwell's questions to Zinn, (p. 19,) on cross-examination, when he endeavors, but unsuccessfully, to show that in the remarks he made to Zinn, '*he might have alluded to some of the tracts in the Slater connexion.*' There are also to be found (p. 32) among the exhibits filed by the Complainant, a certificate from Louther, clerk, that Maxwell

was the purchaser at $31.53 of 19,944 acres in Ritchie county, returned delinquent and sold in the name of William Slater, for taxes due in October, 1845, amounting to $30.03. And a further certificate from McKinney, clerk of the same county, that 9,944 acres of land, (evidently the same 19,944 which were sold in 1845, or a part thereof,) were returned *delinquent in the name of William Slater*, for taxes of 1846–7–8–9, amounting to $23.78. That *twenty-five acres* thereof were sold to satisfy said taxes; and were bought by *Lewis Maxwell*, for $24.96. And then follows, under date of *30th August*, 1852, a receipt from Lewis Maxwell to William Slater, by the hand of Slater's attorney, W. A. Harrison, for the sum of $30, in redemption "*for twenty-five* acres "of land, *purchased by me in September*, 1850, *for taxes, and sold* "*as land belonging to said Slater, by the Sheriff of Ritchie county.*" The foregoing is the substance of the evidence, on the part of the Complainant.

On the part of the Defendant the testimony is brief.

Thos. S. Neely, (p. 26,) and James McKinney, (p. 27,) were examined for the purpose of showing that they were present at the sale in question, and that they did not hear "Maxwell proclaim before the crowd of bidders, that they need not purchase William Slater's land, because said Slater would redeem his tracts of land."

McKinney and John Harris (p. 28) were examined to prove that the Sheriff in selling the lands, asked first, who will pay the taxes and damages for the least quantity of acres, on each tract: and that, when getting no bid for a less quantity of acres, he sold the whole tract.

Beside these witnesses, no others were examined except the following: to the veracity and credibility of two of the Complainant's witnesses, Zinn and Jones.

Cyrus Hall, the States Attorney for the county of Ritchie, was interrogated as to the character of Zinn; and his reply was "*I know nothing against him, as a man of honesty, veracity, and truth.*"

(It may be here remarked, that the depositions of McKinney, Hall, and Harris, appear to have been taken by the Defendant, before a Justice of the Peace, *without any notice to the Complainant;* and strictly therefore, were not entitled to be read. Without McKinney and Harris, who were not cross-examined by Complainant, there is no evidence as to the mode in which the Sheriff conducted the sale.)

John P. Harris and Noah Rexroad, (p. 30,) were examined by the Defendant with a view of proving that James R. Jones, one of the Complainant's witnesses, was not worthy of belief on oath. The examination was very irregularly conducted. The first question put to each of these witnesses, was 'what is the general character of James R. Jones as a man of truth?' to which they reply: the one 'that he believes it is not very good,' and the other 'that it is not good.' The next question put to each of the witnesses is, 'What is the general character of James R. Jones, as a man of truth and veracity, under oath?' to which they both reply, 'that they are *not acquainted* with his character when under oath.'

To rebut this testimony, four witnesses are examined for the Complainant: Patton, McGee, Rexroad and Wilkinson, (p. 31.)

Each of these witnesses proves his acquaintance for many years with Jones, and his residence within four or five miles of him. No one of them professes to know anything against his character for truth: or his credibility under oath. The last, Wilkinson, says, 'from his reputation, I would believe him as soon as men in general under oath.'

The Exhibits filed by the Complainant, (beside the certificates of Louther, clerk, and McKinney, clerk, the receipt of Maxwell, and the Deed from Slater and wife, hereinbefore referred to,) are, (p. 35,) Deed from Henry O. Middleton to William Slater, 1st April, 1840, for the 19,944 acres of land, in controversy, the consideration being $3,043: and the two Deeds from Louther, clerk of Ritchie county, to Lewis Maxwell of the same land, as sold to him for taxes, the first (p. 54) for 8,001 acres in

Ritchie county; the second (p. 57) for 11,943 acres in Doddridge county. (It will be observed that the acknowledgment of the latter, is defective, there being no date to the acknowledgment, or to the certificate thereof.)

The Exhibits filed by the Defendant are certificates (pp. 46, 47) that Benjamin Webb was Sheriff of Ritchie County in 1845, and that James McKinney was one of the Deputies. Also, a certificate from McKinney, as Clerk, (p. 52½,) to a list returned by himself, (as Deputy Sheriff,) of sales of delinquent lands in Ritchie County, (pp. 48, 49, 50, 51, 52.) Besides these, there is a copy of Deed from Henry O. Middleton to Lewis Maxwell, 25th May, 1840, for 3,997 acres of land in the "Company" of which he and Slater were members.

The foregoing is a full abstract of all the pleadings and evidence in the cause, on both sides.

APPELLANT'S POINTS.

I. The first material allegation in the Bill is, that the lands were *sold at a grossly inadequate price: so gross as to be fraudulent as to the Complainant.* The proof on this point is full and uncontroverted. The 20,000 acres of land sold were worth, at the time of sale, on the testimony of all the witnesses, at least $10,000. Even a *quit claim* title would have yielded, according to the proofs, $5,000. And yet the entire Tract was sold for the paltry sum of $31.50! All the witnesses agree, that 100 acres of the land were worth more than the price at which the whole was sold. At a tax sale of the same lands, only five years afterwards, 25 acres brought $1 per acre! It may, therefore, be fairly stated, that the proofs establish, conclusively, the fact that $\frac{1}{200}$ part of the land was worth the price at which the entire Tract was sold. If this were a case between vendor and purchaser, no Court of Equity would hesitate to grant relief, (without proof of any special circumstances of imposition, undue

influence, or fraud,) upon the ground that the unreasonableness and inadequacy of the bargain was so made out, (to use the words of Lord Eldon, 9 Vesey, 246,) as "to shock the conscience, and amount *in itself* to conclusive and decisive evidence of fraud."

1 Story's Commentaries on Equity, sec. 246.
Osgood *vs.* Franklin, 2 Johnson's Ch. Reps., 22.

There would seem to be no good reason why the same principle should not apply to a purchase at a public auction; nor why the presumption of fraud should not be equally conclusive in both cases. Mr. Vice-Chancellor Wigram, in Borell *vs.* Dann, 2 Hare, p. 451, while refusing to set aside a sale at public auction for *mere* inadequacy of price, states the exception to be "where the inadequacy is *so gross, as of itself* to prove fraud or imposition on the part of the purchaser." And, though he intimates that the case 'must be strong' that would make a purchaser at auction chargeable with fraud, on account of inadequacy of price, he does not seem to question that the rule of presumption should apply in *gross* cases as well to public as to private sales.

II. "But where there are other ingredients in the case, of a *suspicious nature*, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud."

1 Story's Com., S., 246.

The allegation of the Bill, which is intended to reach this point, is to the effect, that the Defendant, with the design of preventing competition at the sale, and to enable himself to buy

the lands for a song, fraudulently stated to by-standers, "that the Complainant would redeem his lands from the purchaser." If this allegation can be considered as sufficiently proved, and it be taken in connexion with the gross inadequacy of price as proved, a case of fraud sufficient to vitiate the sale must be conceded to be made out. If only circumstances of a *suspicious* nature are necessary to be superadded to proofs of gross inadequacy to furnish vehement and conclusive presumption of fraud, a *fortiori*, must the conclusion be irresistible, where it is shown that the purchaser makes a false representation, which is both intended and calculated to suppress competition, so as to enable him to buy the lands at a grossly inadequate price. The Defendant was one of the part-owners, with Complainant, in the land company, in which the lots of the Defendant and others were offered for sale for taxes in arrear. He resided near the lands and the place of sale, while the Defendant and all the other part-owners resided at a distance, in another State. The bidders at the sale, composed of his neighbors, would readily be impressed by his statement, as authoritative, that the owners would redeem their lands; and by the belief that he desired to purchase, at the amount of the taxes only, for their benefit. The representation, therefore, under the circumstances, was artful and calculated to deceive. The fraudulent motive and design of the Defendant in making it are evident; and by being connected with the other presumptive proof of fraud arising out of the gross inadequacy of price, the chain of evidence, on this head, is made complete.

But, upon another distinct ground, this sale must be decreed to be void. Even if it were not tainted by such gross inadequacy of price, the deliberate attempt and plan of the Defendant to suppress competition at a public sale, especially a judicial sale, must be held to be contrary to public policy, and to deprive him of all right to the benefit of his purchase. Agreements between parties, not to bid against each other, at public sales,

especially where such public auctions are directed or required by law, have been repeatedly held to be void, as unconscientious, and against public policy, on the ground that they have a tendency to affect, injuriously, the character and value of such sales, to mislead private confidence, and to operate virtually as a fraud upon the sale.

Story's Com., vol. I., s. 293.
Jones *vs.* Caswell, 3 Johnson's cases, 29.
Doolin *vs.* Ward, 6 Johnson's Reports, 194.
Gardiner *vs.* Morse, 25 Maine, 140.
Brisbane *vs.* Adams, 3 Comstock, 130.
Phippen *vs.* Stickney, 3 Metcalf, 386.

This rule has been held to apply with especial force to tax sales. The fact, (as in this case,) that the owner is generally absent and ignorant of the sale, and his want of all power of self-protection against the usually depressing influences of such sales, has been held to entitle him to relief against any, the slightest, attempt to check free competition among bidders; and to the right to have the sale vacated, where it is shown that an agreement has existed to suppress bidding.

Vide case of Dudley *& al. vs.* Little *& al.*, 2 Hammond's Ohio Reports, 504.
Blackwell on Tax Titles, 466–470.

And clearly an agreement between two or more for their joint benefit, not to bid against each other, cannot be more objectionable than a false representation made by one for his own benefit, with the design of preventing others from bidding against him. They are both contrary to public policy, as intended and calculated to suppress competition; and of the two, as the latter act comes within the definition of actual fraud, while the former is treated merely as constructive fraud, there is the greater reason, in the latter case, for declaring the sale void, and depriving the guilty party of the benefit of his purchase.

Fuller *vs.* Abrahams, 3 Brod. & Bing., 116.

On the assumption that the case is made out as alleged, the jurisdiction of a Court of Equity to set aside the sale, cancel the tax Deed, and enjoin the purchaser, and those claiming under him, from asserting title, cannot be questioned.

Blackwell on Tax Titles, p. 571 *et seq.*

Yancey *vs.* Hopkins, 1 Munf. Va. Rep., 419–437.

The only remaining question under this point is, therefore, whether the averment of fraud, as made in the Bill, is sufficiently proved. It is first to be remarked, that the Defendant, by his answer, does not explicitly deny the charge. The allegation touches a matter peculiarly within his knowledge. It sets forth, distinctly, a fraudulent representation, openly made by him, and of such a character that it is impossible to suppose him either ignorant or forgetful of it; and instead of an indignant and positive denial of the charge, he answers that *he does not believe* he made the statement as alleged. There are *two* witnesses who swear positively that he did. Both of them heard him state to certain parties "that it was no use for them to bid — that he knew the owners, and they would redeem the land," (pp. 19 and 23.) An attempt is made, by the defence, to impeach the general character for veracity of one of these witnesses (Jones.) The other (Zinn) stands, as does his evidence, perfectly unimpeached. Two witnesses (Harris and Rexroad, p. 30) are examined, both of whom (though they state that the general character of Jones is not good) answer, also, in reply to the Defendant's own questions, 'That they are *not acquainted* with his general character as a man of truth and veracity, when under oath.'

The examination is irregular and ineffective.

Greenleaf's Evidence, vol. I., sec. 461.

There are four witnesses examined (p. 31) to rebut this evidence. They all profess to know Jones, and to reside within four or five miles of him. None of them have heard anything

against him. The last of them says, 'from what I know and have heard of him, I would believe him as soon as men in general, when under oath.'

It may be fairly stated, that the oath of Jones is not successfully impeached; that there are, therefore, *two* witnesses in support of the Bill, against the Defendant's answer.

But even supposing that the defence have succeeded in casting a suspicion upon the witness Jones, it by no means follows that the Bill is not sufficiently proved. The rule requiring two witnesses to countervail the answer applies only where the statement of the Defendant is equally positive with that of the witnesses. The reason of the rule, as stated by C. J. Marshall in Clark *vs.* Van Reimsdyk, 9 Cranch, 160, is, that the Plaintiff, by calling on the Defendant, makes his answer evidence. And as his testimony is equal to that of any other witness, if given with equal positiveness and means of knowledge, the Plaintiff must have another witness, or circumstances, to turn the balance of proof in his favor. This reason, obviously, does not apply where the Defendant gives his testimony on belief only, and the other witness speaks positively to the contrary. Greenleaf says, vol. 3, sec. 289, (Evidence in Equity,) "If the fact is denied on belief only — or is denied equivocally, indistinctly or evasively, in the answer, *the testimony of one witness may be sufficient against it.*"

But beside all this, there are pregnant circumstances which confirm Zinn's plain statement. The Defendant, in his answer, three times reiterates that he does not *believe* he made the statement that *Slater* would redeem, &c. Now the witnesses say that Defendant's statement was, that *the owners* would redeem, &c.; and that he stepped up and made this declaration at the time the Sheriff offered for sale the *Slater* lands. It will further be remarked, that the Defendant, conducting the cross-examination *himself*, asks Zinn *whether he might not have alluded to some other tracts?* This is a conclusive admission that he (the Defendant) did make the representation without using the names of the owners, else he could not have asked that question. This fur-

nishes the key to his answer. He satisfies his conscience by saying, that *he does not believe he used Slater's name.* But he does not unequivocally deny using the expression as testified to by the witnesses, that *the owner* would redeem, &c. In the cross-examination of Jones, the attempt is again made, (more adroitly, but not more successfully than with Zinn,) to show that the Defendant *might* have referred to some other tracts 'lying in the *Slater* connexion.' But, moreover, the facts that *no one bid* for the Slater land, save the Defendant; that he bought it at the precise amount of the taxes — when it was worth 200 times that sum — are 'pregnant' in corroboration of Zinn's testimony, that the fraudulent representation *was* made.

III. The learned Judge who decided the case below, concedes that the fraudulent representation imputed to the Defendant is sufficiently proved; but he dismisses the Bill simply upon the ground that he can take no cognizance of it, "by whatever wicked purpose prompted," unless it is shown by positive proofs to have produced an injurious result. This view of the case, it is submitted, cannot be sustained. It ignores entirely the *gross inadequacy of price*, which might *of itself* be sufficient to vitiate the purchase; but which, taken in connexion with the proof of 'wicked purpose' and fraudulent representation of the purchaser, *must* avoid the sale. It omits altogether the considerations of public policy, which have induced Courts of Equity to set aside sales, especially judicial sales, as against purchasers who have fraudulently attempted to suppress free competition among bidders. In such cases, the inquiry is not, how much injury has been sustained, but whether the fraudulent purpose to effect it has been proved. The object of the law is to suppress unconscientious acts and agreements which are *calculated* to work mischief, not to justify them when unsuccessful in their fraudulent design. The Court looks beyond the particular case, to general interests, where '*public policy*' requires the

establishment of a rule; and no particular case can be excepted from that rule, upon the ground that although the act condemned was both intended and calculated to work mischief, yet that it was not shown to have *effected* its evil purpose.

But this case is not without direct proof that the Defendant *accomplished* his fraudulent design. The Judge below, in interpreting the evidence on this point, gives the *Defendant* the benefit of all the doubts. This is not in conformity with the uniform current of authority in tax cases, in which no presumptions are allowed in favor of the purchaser, and especially not where *fraud* is conceded to be proved against him.

Blackwell on Tax Titles, p. 88.
Wilson *vs.* Bell, 7 Leigh., 24, 25.

Jones proves positively that the Defendant stated to Zinn and Bukey 'that they need not bid,' &c. Zinn proves the same. Bukey is dead. In answer to the question, whether Defendant's statement prevented any one from bidding, Jones says: "It appeared to me that Zinn and Bukey were going to bid: *they said they were going to bid on the Slater land.*" This is positive enough, and yet the Judge below says that Jones 'speaks doubtingly.' In regard to Zinn, the Judge says, it is *clear* that Jones was mistaken in saying that Zinn intended to bid, because Zinn says 'he would not buy the land with a *quit-claim* Deed.' It no where appears that Zinn looked upon a tax title as no better than a *quit-claim* Deed. On the contrary, it appears that he conceded the tax title a good one to buy, for he says, "*at the time of the sale*, 80 acres, if sold separately, would have brought $40." In regard to Bukey, the Judge disposes of his proved intention to bid in this summary manner: 'We have seen that Jones was mistaken about Zinn, and it is *rational to suppose* that he was mistaken as to both.'

With all respect, it would seem more rational, if there were any doubt on this point, to look for its solution where the Court below has not — to the surrounding circumstances given in evidence. And the question being, whether the Defendant's representation, which it is conceded was not only designed but calculated to stifle competition, did its work, the answer will be found, if not in the positive testimony of Jones, in the facts: *that no one did bid, save the Defendant;* that he bought the land for $31.50, the exact amount of taxes, when it was worth from $5,000 to $10,000; that 100 acres, if sold separately, would have brought $50, if the sale had been free from redemption, and yet, that *no one* offered to pay $31.50 for *less* than some 20,000 acres of land; and, furthermore, that at a *free* tax sale of the same land in 1850, 25 acres brought $25, the Defendant himself being the purchaser.

IV. The fact that these lands (or a part of them) were sold in 1850 for arrears of taxes for 1846-7-8-9, and were then (notwithstanding the former sale) still returned delinquent, in the *name of William Slater;* that the Defendant was again the purchaser, agreeing to take the least amount, viz.: 25 acres, for the taxes, $24.96; and that, in 1852, within 2 years from the sale, he allowed Slater to *redeem* the lands, by payment to him of $30, describing the lands "as purchased by me (Louis Maxwell) in "September, 1850, for taxes, and sold as land *belonging to said* "*Slater*, by the Sheriff of Ritchie County," presents a further point. That no one has a right to *redeem* lands sold for taxes, except the owner, or some party having an interest therein, is clear. That the Defendant, after purchasing the lands in 1845, allowed them, or a part of them, to be again listed and sold in the name of Slater in 1850, and to be redeemed from him by Slater in 1852, is also clear. His motives, however, are not clear. It may have been that he abandoned for a time, and

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afterwards resumed, his fraudulent designs to obtain the 'Slater' lands; or, it may be that his original intention was to buy the lands for the Complainant, and that his fraudulent attempt to hold them as his own is only recent. But how, after having allowed, for whatever purpose, the Complainant to pay him a required sum to *redeem* the lands in 1850, and thus *treated with him as owner* of all the lands listed and sold in his name, can he, in equity, be allowed to set up an inconsistent tax title acquired in 1847, and to refuse the Complainant the right of redeeming that title? He is certainly estopped. And upon the principles of equity governing such cases, he must be held, in view of his purchase in 1845, upon the statement that the owner would redeem, and of his subsequent treatment of the lands in 1850 and 1852 as the property of that owner, to have purchased them in 1845 not for his own account, but for that of the owner; and he must be treated as a *Trustee*, holding the title for the use of the real owner, and compellable to convey the lands to him on receipt of the moneys advanced for the taxes and other expenses.

2 Story's Com. Equity, sec. 1265.

1 Story's Com. Equity, secs. 384 to 390.

V. Independent of the objections to his title, growing out of the fraud of the purchaser, there are various defects in the proceedings, sufficient of themselves to invalidate his Deed. The burden of proof is upon him to show an exact conformity to all the requirements of law for divesting the owner's title; and the utmost strictness, even in the most trifling and apparently immaterial particulars, is exacted in this respect.

See Blackwell on Tax Titles, pp. 79 to 83, and pp. 93, 94, and cases in this Court, cited in note.

1. In this case *there is no proof of any sort* of any of the proceedings *before* the sale. The Code of Virginia of 1849, (referred to for convenience, as embodying the laws of 1831-2, 1840-1,

under which this sale was made,) sets forth all these prerequisites, (p. 200, Title 12, Chapter 37, secs. 1, 2 and 3.) There is nothing to show that they were complied with, and such want of proof creates a fatal defect in the title.

Williams *vs.* Peyton, 4 Wheaton, 77.
Early *vs.* Doe, 16 Howard, 618.
Jesse *vs.* Preston, 5 Grattan, 130.
(especially the Va. cases.)
Nalle *vs.* Fenwick, 4 Randolph, 585.
Allen *vs.* Smith, 1 Leigh., 231.
Chapman *vs.* Bennett, 2 Leigh., 329.

2. The 5th section, p. 201, (Act 1831–2,) provides that the sale "shall be of each Tract separately, or of such quantity or "part thereof as shall be sufficient to satisfy the Taxes thereon."

The uncontradicted proof, *from parties present at the sale*, is, that 100 acres, if sold separately, would have brought the amount of Taxes; and yet, 20,000 acres were sold! and 25 acres of the same land, sold in 1850, brought the amount of taxes then due.

Blackwell on Tax Titles, p. 335.
Stead's Executors *vs.* Course, 4 Cranch, 403.
Mason *vs.* Fearson, 9 Howard, 260.

3. The 9th section, p. 201, describes with extreme particularity the nature of the return of sales which must be made under oath by the Sheriff, to the County Court, 'at the first or second term of Court, after completion of the sales.' (sec. 11, p. 202.) An attempt, but a most imperfect one, was made to comply with these provisions. The copy of the Sheriff's return will be found, pages 48, 49, 50, 51, 52, 52½ of the Record. It is not correct, in *any* particular.

I. The caption is informal. It does not contain, as required, the *date of the sales.* (s. 9.)

II. The last column in the list, which is only authorized to be added in case the sales *were not all one day*, is no sufficient substitute for the caption: for it names no other day of sale than 7th October, 1845, and that only in a few cases, leaving the great bulk of sales *with no date at all.* (s. 9.)

III. The list required "must contain the several columns mentioned in the 7th section, with a *like caption* to each column," (s. 9.) There is, actually, in the list filed, no column under the caption "*Quantity of land sold*," and, therefore, no means of ascertaining whether the whole or a part of each Tract was sold.

IV. The affidavit to be subjoined to said list, is required to contain the statement that it contains a true account "of all lands sold by me *during the present year*, for the non-payment of taxes thereon for the year ——" (s. 10, p. 202.) The affidavit in this case (p. 52½) does not state *when the lands were sold*, but only that they were sold for non-payment of taxes of 1840–1–2–3–4.

V. Said list, with said oath, must be returned by the Sheriff to the County Court at the *first or second term* after completion of the sales, (s. 11.) The Clerk's certificate (p. 52½) does not show when the return was made into his office. The certificate is not dated until, *March*, 1853; and for aught that appears to the contrary, the returns may not have been made for years after the sale. There is inherent evidence that it was not made in time, for the margin of the Sheriff's list contains entries made in 1846 and 1847.

VI. (Sec. 11.) The list, when returned and approved by the Court, must have a copy *certified to the First Auditor.* This does not appear ever to have been done.

VII. The list contains on its face other evidences of gross irregularity. By notes *appended to the list*, and not in conformity with the law, it appears that it contains sales made by *three* other Sheriffs, viz.: of Harrison, Wood, and Lewis counties. And yet

McKinney swears that the sales were *made by him*. Moreover, it appears that many of the sales were made in 1840, and the caption shows that they were all made for Taxes of 1840, '41, &c.

VIII. It contains list of sales made to the Commonwealth, which are required by section 24 (p. 204) to be differently and separately made out and certified. It also contains a long list of sales made to David W. Sleeth, which are elsewhere certified to have been made to the Commonwealth.

Some of these irregularities may appear to be trifling: but in view of the authorities, they are all material. They come within the class of conditions subsequent, which must be absolutely complied with, to make the sale valid. Such of them as show want of certainty, as to the date of the sale, the amount of land sold, the time of the returns to the Clerk, and of his certificate of the proceedings to the *first auditor*, are, however, obviously material; as these are the only means provided, by which the absent owner may gain information at the office of the auditor of the sale of his lands, in time to redeem them. The utmost strictness in respect of these subsequent proceedings, has been exacted in favor of the owner.

See Blackwell on Tax Titles, chapter on 'conditions subsequent,' p. 355 to 367, (and cases there cited.)

Andrews *vs.* Senter, 32 Maine, 394.

Culver *vs.* Hayden, 1 Vermont, 359.

Coit *vs.* Wells, 2 Vermont, 318.

Sumner *vs.* Sherman, 13 Vermont, 609.

4. The deed from Louther, Clerk, to the Defendant, was never properly acknowledged. The certificate of acknowledgment

bears no date, (p. 61.) Unless properly executed and recorded *within* 6 *months*, it does not pass title to the Defendant against the owner's right of redemption. (Sect. 21 and 22, p. 204.) There was no authority in the Clerk to record it, unless properly acknowledged. Title 33, chap. 121, sec. 3, p. 512.

WM. F. FRICK,
for Appellant.

POINT V., SEC. 5.

There is a further defect in the proceedings, sufficient of itself, (upon all the authorities,) to avoid the sale. The 19,944 acres sold, consisted of 9 separate tracts or parcels, situated in different counties; each tract being distinctly defined and described, with its respective number of acres noted, (see Deed from Middleton to Slater in 1840, p. 35.) Four of these tracts, comprising altogether 7956 acres, were at once, in 1840 by like descriptions conveyed by Slater to Moir and Hopkins, (see Deed of same, p. 32.) The 19,944 acres were listed, returned delinquent, and sold in 1845, as *one tract*, belonging to *William Slater*. The authorities all agree, that wherever the State law requires each tract or lot to be separately listed and assessed, and in the name of its proprietor, these requirements must be strictly complied with; and a failure in either is fatal. The laws of Virginia under which this assessment and sale were made, are 10th March, 1832, ch. 290, Sects. 12, 13 and 17, (to be found in Supplement to Revised Code, 1833,) and February 24th, 1841, ch. 2, sects. 10, 22, 23, 93, 96 and 97, and are substantially the same as those embodied in the Code of 1849, page 185, chapter 35, sec. 45. By these the Commissioners of assessment are required to list *each tract separately*, and also to list *the name of the person who by himself or tenant has the freehold in possession*, his residence, nature of his estate, *the number of acres in each tract &c*, *&c.*, *&c.*

In Yancey *vs.* Hopkins, 1 Mumford, 419, the sale was decreed void, because the land was listed in the name of the widow, instead of the heir of an intestate.

In Shimmin *vs.* Inman, 26 Maine, 228, a similar decree, because the land was not listed in separate tracts, though there was one owner to the whole.

And in Barker *vs.* Blake, 36 Maine, 433, where an entire tract was listed and sold in the name of A, when he had previously sold a part to B, the sale was held void *in toto*.

And see Blackwell on tax titles, (edition of 1855, as before,) pp. 173, 174, 175, and other cases there referred to.

The formal defects are well marked: but there are also these substantial objections to the proceeding, growing out of its nonconformity to the Statute. Slater could neither have paid his taxes before sale, or redeemed his land afterwards, *without paying also Moir's and Hopkins' taxes:* and if the tracts had been separately listed, the sale of one of them might (and upon the evidence, would) have produced more than enough to pay the taxes on them all; and thus the sacrifice of the whole would have been avoided. See Point V., Section 2.

Supreme Court of the United States.

WILLIAM SLATER'S REPRESENTATIVES,
Appellants:

vs.

LEWIS MAXWELL'S REPRESENTATIVES,
Appellees:

No. 41.

On Docket of Dec. Term, 1867.

Brief and Points of the Appellees.

WILLIAM SLATER'S REPRESENTATIVES,
Appellants:

vs.

LEWIS MAXWELL'S REPRESENTATIVES,
Appellees:

In the Supreme Court of United States:

No. 41.

On Docket of Dec. Term, 1867.

Brief and Points of the Appellees.

Appeal from the District Court of United States, frem Western District of Virginia.—

William Slater, in April 1852, filed his bill (printed record p. 1,) alleging that on 1st April 1840. he purchased from H. O. Middleton, 19,994 acres of land, consisting of several parcels, all lying in Ritchie County; that they were placed on the Commissioner's books of said County, and charged with taxes for the years 1841, '42, '43, and '44, and were returned delinquent for the non-payment of taxes, amounting to $30,03 cts. that under the authority of the legislature of Virginia, the auditor of public accounts transmitted the delinquent list of that County to the sheriff with direction to sell according to law; and that on the 7th of October 1845 the sheriff did, at public auction, sell to

the said Maxwell the whole of said 19,994 acres for $70.93 cents: that at the time of said sale Doddridge County had been created by act of 4th Feb. 1845, and enclosed in its boundaries 11,943 acres of said lands: that the Clerk of Ritchie County, by deed of 27th Oct. 1847, conveyed that part of the land in Doddridge County to said Maxwell, and by another deed of same date conveyed the residue to him: that on the 1st of August 1840 Slater had conveyed to Hopkins Moir 7,955 acres of said land, and at the time of the tax sale owned but 12,037 acres of said land He further alleges that the land was worth 50 cents per acre, making a total of $6,000: that complainant offered Maxwell the money paid by him with costs and expenses; that 200 acres of said land would have sold for sufficient to pay the taxes and damages on said land; that Maxwell claims title under said sale:—the sheriff combined with Maxwell to enable him to purchase at an inadequate price, and insisted that Maxwell should be required to release to him.—He further alleges that at the time of sale many persons were present to purchase small tracts for farms; but Maxwell stated to the bystanders, that he was an authorised agent to buy in the lands for complainant, and in this way put down all competition and bidding for the land, and was enabled to have it knocked down to him for the amount of the taxes: that this conduct of Maxwell was fraudulent; and prays that Maxwell may berequired to yield up to complainant possession of said land, and release to him whatever right to said land he may have acquired under the deed from said clerk, and for general relief.

On the 2nd day of September, 1852, (page 4, printed record) said Maxwell filed his answer, admitting the purchase, denying all fraud or combination with the sheriff, or that the sheriff exceeded his authority, or that in his opinion, the land at the time of said sale was worth 50 cents an acre, As to the

charge in said bill that he stated to bystanders at the sale that he was the authorised agent to buy said tract for said Slater; he answers that "it is believed by this respondent to be all untrue. He denies that his conduct at the sale was fraudulent in any way. He further answers that he did not surrender his title: but that he settled with and took releases from Levering for 3,979 and from Saunders for 2,000 acres of said land, claimed by them. And speaks of the doubt and uncertainty of the title and location of said land, the manner of the entry and assessment of such lands, as circumstances affecting the sale, and causing a general unwillingness in persons to bid for the same. To this answer no exceptions were taken; but general replication put in at the time it was filed.

The case was then continued until August 1855, when the Complainant obtained leave to amend his bill, and case was sent to rules for that purpose. Monthly continuances at rules were then taken by complainant, until June 1857, when he filed his amended bill. This was in all respects exactly the same as the original bill excepting the allegation in the latter that the defendant had stated to the bystanders attending the sale that "he was an authorized agent to buy in the land for the complainant," was omitted, and the allegation that he stated that "your orator would redeem his land from the purchaser," substituted in its place. In fact as shown by the opinion of the court, which is ordered to be made a part of the record, no new paper was filed, but the original bill with the statement as to the agency expunged and replaced by the allegation that the complainant would redeem the land, was adopted as the amended bill. See the bill commencing on p. 6 of the record.

In August 1857 the defendant answered the new allegation. He says he had no recollection of making such statement, that he does not believe that he made it and that he believes the charge that he made it to

be untrue. See this answer p. 9. To this answer the complainant replied generally.

This was the state of the pleadings at the hearing of the cause.

The proof relied upon by the complainants is as follows: 1st the depositions of Asa Bee [p. 16 pr record] Zebulon Bee [p. 16 & 17] Joseph M. Wilson, [p. 17] and Jonathan C. Lowther, [p. 17 & 18] taken by complainants 3d August 1852. the deposition of Quilly M. Zinn, taken on 15th Feb. 1853, [p. 18 & 19 pr record] and the deposition of Elijah Taylor, [p. 21 & 22] taken by complainant, 19th July, 1852, all of which were taken before the amended bill was filed; together with the deposition of James R. Jones, [p 23, 24 & 25 pr record] taken by complainant.

Asa Bee, Zebulon Bee, Joseph M. Wilson and Jno. C. Lowther, stated that they were acquainted with lands of said Slater of from 700 acres to 4000 acres. They estimate the value of the land at the time of sale in 1845, at from 40 cents to 62½ cents per acre, and that from 75 to 100 acres would have been sufficient if sold in parcels to raise $40. That said land with a quit claim deed would have been worth not more than from 20 cents to 25 cents per acre. Wilson did not hear Maxwell refer to Slater at the time of the sale.— Quilly M. Zinn thinks the land at time of sale was worth 50 cents per acre, and that 80 acres would have brought $40, if sold in parcels. Says he was present at the sale of the land called the Slater land, that when the sheriff was crying it, "Maxwell stepped up and said that he knew the lands, and it was not worth while for any person to buy it, that they would pay the taxes." *Thinks* Austin Barkly was crying the land at the time. Spencer J. Bukey was standing by at the time. Says he don't know what the Slater land would have been worth with a quit claim, but that he "would not buy land at all with such a deed."

Elijah Taylor states that a company was formed [without date of formation, time of existence, &c.,] which purchased 52,000 acres of land in Western Virginia, but does not show

from whom purchased, or when, or what land or where located :—that witness and the complainant and defendant and others were members of said company, that all of the members except defendant lived in Baltimore city and county.

The said James R. Jones states : he was present at sale in 1845, and heard the sheriff offer the Slater land for sale, that said Maxwell, S. T. Bukey and Manly Zinn were present, that Zinn "appeared as if he wanted some of the land." Mr. Maxwell said he knew the men, and it was no use for them to bid, that it would be redeemed—that he understood Maxwell to mean the owner of the land. In answer to questions whether any one would have bid on this land if Maxwell had not made the representation aforesaid, he says, "it appeared to me that Mr. Bukey and Mr Zinn were going to bid; they said they were going to bid on the Slater land." Also says that he don't recollect of any other tract of land being sold, or of any other being present at the time of the conversation of Maxwell with Bukey and Zinn. Manly Zinn did not say why he wished to bid for the Slater land. "He only said he would like to have some of the Slater land." 2d. The exhibits consisting of the deed of Henry O. Middleton to William Slater, dated 1st of April, 1850 [p. 35 pr record] and the deed from William Slater and wife to William L. Hopkins and James Moir, dated the 1st day of August, 1840.

This constitutes the evidence in the cause offered by the complainant to sustain the allegations of his bill. The certificate of William R. Lowther, Clerk of the County Court of Ritchie County, dated the 7th of June, 1849, found on page 32, printed record, and the certificate of James McKinney, Clerk of the said Court, [without date] found on same page, and the receipt of Lewis Maxwell, dated 30th August, 1852, found on same page, and copied on the record as exhibits of the complainant, are not made such by the bill, nor are they evidence, for want of proof or authority to make such certificate.

The evidence of the defendant consisted of the deposition of Thos. S Neely, [see page 25–26 pr record] who states that he was present during the whole sale in 1845, and purchased some of the lands, among them the Adam Weaver tract of 2,000 acres. That defendant purchased some tracts of land ; he was sitting by quietly at sale, said nothing that witness could remember, but occasionally gave a bid. To

the whole land instead of part, is denied by the answer, and is fully and distinctly disproved. The proof is that he precisely complied with the directions of the statute in offering a less quantity for the taxes, and only offering the whole when no bid of a less quantity could be had. See depositions of McKinney, (the sheriff.) p. 26, and of John Harris, p. 27.

5. The allegation that Maxwell stated to the bystanders, at the sale that he was an authorised agent to buy in the land for the owner, is denied in the answer, and not a particle of proof adduced in support of it. It was accordingly abandoned, and expunged from the bill when the amendment was made by inserting a different allegation in place of it.

6. The allegation made by the amendment to the bill that Maxwell stated to the bystanders at the sale that Slater would redeem his land from the purchaser and thus was enabled to put down competition and buy in the land for himself constitutes the sole remaining ground of equity in the complainants case. This allegation is wholly insufficient.— It was not even charged that it was untrue or that Maxwell knew it to be untrue, or, that he believed it to be untrue, or that he did not know whether it was true or false. The mere allegation that Maxwell made such a statement must be utterly inconsequential unless accompanied by the allegation that it was falsely and fraudulently made. The simple making of such statement could not itself import fraud.

7. This allegation is denied by Maxwell in his answer where he says that he has no recollection of making such a statement, that he does not believe that he did make it, and that he believes the charge that he made it to be untrue.— This denial is sufficient to put the complainant to full proof both under the Virginia statute and according to the rules of equity pleadings. Where matter responded to occurred more than six years before, and especially if it be a conversation or statement made (here the respondent was speaking of what he is charged to have said nearly twelve years before) a denial on recollection or belief is sufficient.

Code of Virginia, [ed. 1860] ch. 171 § 40, p. 713.
Story's Eq. Pl. §§ 854, 855.
Coop. Eq. Pl. 309, 310.
2. Daniels' Ch. Pr. 254, 257.
Hall vs. Wood, 1 Page 404.
Brooks vs. Byam, 1 Sto. Rep. 296.

8. If the answer was deemed evasive or insufficient, complainant should have excepted to it, and not replied generally. His general replication is a waiver of exceptions on this account.

Story Eq. Pl. § 867.

Cooper Eq. pl, 321, 322.

9. The statement imputed to Maxwell at the time of the sale, was of a trifling and immaterial thing. It was vague and inconclusive, and in its essential character but matter of conjecture or opinion, as to which none of the parties could be presumed to confide in any other. There was no special confidence, relation or influence as between Maxwell and the owner of the land, or the bidders at the sale, which should forbid his expression of his opinion or confident belief that the owner would redeem it or give any one who would bid a right to place implicit reliance upon it. It was a mere *gratis dictum* in respect of which Maxwell was under no legal obligation or pledge to anybody for precise accuracy of statement or certainty of inference or conclusion, and it was his own folly or indiscretion, if any one who heard it chose to give implicit credence to it, and forbear to bid for no better reason; and this especially as Maxwell, by bidding himself, showed that he knew he might be mistaken about the owners redeeming, and set the example of taking the chance that he might not redeem.

1 Sto. Eq. Jur. §§191, 194, 197, 199.

Neville vs. Wilkinson, 1 Bro. C. R. 546.

Turner vs. Harvey, Jacob's Rep. 178.

Small vs. Atwood 1 Younge 407, 461, S. C. on appeal, 6 Clarke & Finell, 292. 295.

Philips vs. Duke of Buck. 1 Vern. 227.

Hough vs. Richardson, 3 Story R. 659.

Trower vs. Newcome. 3 Meriv. 704.

Laidlaw vs. Organ 2 Wheat 178, 195,

Evans vs. Bichnell, 6 Vas. 173 to 192.

Davis vs. Meeker, 5 Johns 354.

Vernon vs. Keys, 12 East. 637. 2 Kent's Com. Lect. 39, pp. 484, 485, 486. 1 Fonbl. Eq. Book 1, Chap. §8.

9. The statement imputed to Maxwell that Slater would redeem his land, being plainly his mere impression or conjecture, from his acquaintance with Slater or other circumstances, was not such a statement as any one could be expected to rely on, nor, even if he were mistaken, can it be

considered so plainly injurious to good faith as to constitute a fraud for which his own contemporaneous purchase would be vitiated. His bidding him self at the same time was the best commentary on what he said, and sufficed to disarm it of any injurious influence upon anybody.

Irine vs Kirkpatrick, 3 Eng. L. and Eq. R. 17.
Hepburn vs. Dudop, 1 Wheat, 189.
Taylor vs. Fleet, 4 Barb. 107.
Bacon vs. Bronson, 7 John. Ch. 201.
Fellow vs. Lord Gwydyr, 1 Simons, 63.
Vernon vs. Keys, 12 East, 637.
Story Eq. Jur. §§ 197, 199, 200, 203.
13 Howard, 198.

10. The loss or injury to the complainant of which he now complains was not occasioned by anything done or said by Maxwell, but resulted from his own gross laches and neglect of duty as a landholder, in failing to pay his taxes and redeem his land within the time allowed by law, the sale being in effect merely the transfer of the commonwealth's lien for the taxes, with an equity of redemption in the owner, continuing for two years after the sale. If the one party be in fault, yet if the corrective be fully and perfectly in the hands of the other, and he fail through inattention or lacks to applyit,he is without redress at law or inequity.

11. The proof that Maxwell made the statement imputed to him, is far from satisfactory, and not sufficient to overthrow the denial in his answer; and if he did make it, it is not proved that any one was deterred from bidding by it. The evidence of Zinn and Jones is vague, uncertain and inconclusive. Like all evidence of conversation and statements occurring years before deposed to, it is testimony the least to be relied on. Other witnesses who were present at the time depose that they heard nothing of the kind imputed to Maxwell, and there is no proof going to show that there was any one in the slightest degree influenced by what might have been said except that furnished by the testimony of the testimony of Jones. The deposition of Zinn, one of the three said to be present was taken, but he was not asked the question: Bukey, another, was dead, and his deposition had not been taken. Jones, the third, does not say that Bukey or Zinn was prevented from bidding by what occurred. He says it *appeared* to him they were going to bid. Zinn appeared as if he wanted,—would like to have some,—of the

land. But Zinn shows that he was mistaken in his inference as to him, for, from his testimony it appears that the reason he did not bid was that he would not buy land at all with such a title. The evidence relied on is too slight and unsatisfactory to sustain the charge of fraud, which whenever or wherever made, is not to be presumed or lightly inferred but must be fully substantiated by proof. *Dolum non nisi perspicuis indiciis probari oportet.*

Story Eq. Jur. §§190, 194. Fonbl. Eq. Book 1, ch. 11, §8. 10 Rep. 56.

Trenchard vs Manly, 2 P. Wm's. 166.

Townsend vs. Lowfield 1 Ves. 35.

Walker vs. Symonds 3 Swanst. 61.

Irvine vs. Kirkpatrick ubi. sup.

12. The rules touching the *suggestio falsi* and the *suppressio veri* in the course of a negotiation *inter partes*, can have little or no application to the case of a public sale at auction by a public officer, of land delinquent for taxes, under local law, where the suppoted suggestion or suppression occurred between mere bystanders, alike strangers to one another, and to the owner of the land, and between whom or any of them, no relation of trust or confidence, express or implied, had any existence. The party complaining here is the original owner of the land between whom and Maxwell no special confidence or relation, or influence subsisted, nothing to forbid him to express his opinions freely and without reserve, whatever might be their influence on the course of other bystanders at the sale, to whom also he was under no duty or obligation of any kind whatever

13. By the statutes of Virginia, after the expiration of the time allowed for redemption of the lands sold for taxes, (two years from the time of sale,) the validity of the sale or the purchaser of the purchaser's title cannot be drawn into question, except for irregularities or the fact that no arrearages of taxes existed apparent on the face of the proceedings or by proof of the actual payment of the taxes for which the land was sold. The bill in this case alleges nothing of this kind. On the contrary it impliedly concedes that the proceedings were regular upon their face because it states (pp. 2. 7.) that Max well ostensibly became the owner of the land by his purchases at the sale and the deed made to him by the clerk. The grounds on which relief is sent is sought are fraudulent combination between the sheriff and Maxwell, to enable the lat-

ter to purchase the land at a grossly inadequate price, breach of duty on the part of the former in selling the whole land, when he might have sold a small part for a sum sufficient to pay the taxes, and the statement of Maxwell to bystanders at the sale that Slater would redeem the land from the purchaser, alleged to be fraudulent conduct on the part of Maxwell as to the complainant, all matters *aliunde* dedepending on extrensi proofs, and all repelled by the answer, and sufficiently (it is humbly submitted) by the evidence. It certainly would be an anomaly that relief should be granted upon other and different grounds not set up, or even alluded to in the bill, to which the defendant was never called to answer, which were never suggested or discussed in the court, and never thought of or considered by that court, as sufficiently appears from the opinion of the judge.

See act of March 10th 1832, § 22, ch. 72, p. 63, (Supplement to Revised Code of 1819, p. 363.

Act of February 24th 1841, ch. 2, § 97 p. 28.

14. If substantial requisitions of the law appear on the face of the proceedings not to have been complied with, the effect is to vitiate the sale, and to avoid the deed. The deed then being a nullity, although the court of equity might in the exercise of its powers of preventive justice, before the sale or the deed was made, have enjoined the making of either, yet, after the proceeding is completed and the deed executed, it will not lend its aid to set aside a void deed and deliver possession to the party complaining, his remedy being ample and complete at law, and the deed no obstacle or obstruction in the way of his recovery of possession, if withheld by ejectment.

Moore vs. Brown 4 McLean 211.—*S. C.* 11 Howard 414.—*Farrar vs. Eastman*, 1 Fairfield, 191.—*Hogins vs. Brashears*, 8 English. 242.—*Livingston vs. Hollenbock*, 4 Barbour, *Van Rensselaer vs. Kidd.*, 4 Barbour, 17.—*Cox* vs. *Cliff*, 2 Comst. 118.—*Vandoren* vs. *New York*, 9 Paige. 388.—*Scott* vs. *Onderdonk*, cited Blackwell on Tax Titles, p. 482, also, New York case.

15. The *onus probandi* is upon the party assailing the deed. By the Virginia statute and the construction which has been placed on a similar provision in a previous act he must exhibit the proceedings had and point out irregularities apparent on their face. The former rule on this subject has been reversed in cases where the complaint comes after the period for redemption has expired.

Act March 10, 1832 § 22, *Supp. R. C.* 363. *Act of February* 24, 1841 § 97

Sess Act. 1841 *p.* 28. *Act of February* 9, 1814. 2 *Rev. Code*, 1819 *p.* 542. *Flanagan vs. Grimmett* 10 *Gratt.* 421, 434, 435.

15. That the Sheriff might have sold a part of the land for a sum sufficient to pay the taxes and therefore improperly sold the whole, is not an irregularity apparent on the face of the proceedings, but a matter *aliunde* depending on extrinsic proofs. It cannot therefore be objected after the period of redemption has expired.

17. The Sheriff's return sufficiently complies with the requirements of the law. The sale was made under the provisions of the act of 1832 and of the act of the 24th of February 1841 (§97, ch. 2, p. 28) and not those of the Code of 1849, which are in many respects variant from those of the former.

1. The caption conforms precisely to that prescribed by the act of 1832. It does not require the date of the sales to be given and therein differs from the form prescribed by the Code of 1849 which does. (See Act of 1832, § 17, Supp. Rev. Code p. 362, and Code of Va., 1849, ch. 37, §9, p. 201.

2. The last column of the list is prescribed in *all* cases by the act of 1832, though by the Code of 1849 it is only required in cases where the sales were not all in the same day, the statement of the day of sale in the ca. then being substituted in lieu of this column showing the sales were all made in one day. The date given in this column, (7 Oct. 1845,) was plainly intended to apply to all the sales. The entries of redemption of certain lands in this column were no doubt mere interpolations of the clerk made for convenience when lands were redeemed at his office, (as is the usage) after the list was returned to him, and within the period of redemption.

3. The clerical error in the caption of the sixth column of quantity charged for "quantity purchased" should not vitiate the proceeding — Enough appears on the face of the return taken as a whole, to correct the error. It is a return of lands sold with the purchasers name and shows that the whole tract was purchased. It is an act to be done by the Sheriff after the sale and his failure or mistake cannot defeat the right of the purchaser previouly acquired at the sale.

4. The affidavit to be subjoined to the list required by the act of 1832, is not required to state when the lands were sold, therein differing from that required by the Code of 1849 which refers in terms to sales during the (then) present year. The affidavit in this case conforms precisely to that prescribed by the act of 1832.

5. The list with the oath subjoined is directed by the act of 1832 to be returned to the clerk's office within thirty days after the completion of the sales and not at the first or second term of the county court thereafter as required by the Code of 1849. See § 17, Supp. R. C. p. 363. Code 1849 § 11 202. The list was certainly returned to the clerk's office as a copy certified by the clerk was filed by the defendant and appears in the record at p. 48. The affidavit of the sherriff was made on the 6th of November 1845, within the thirty days after the sale, and the fair presumption is that the list was returned and filed within the same time. The entries appearing to be made in 1846 and 1847 were doubtless mere notes interpolated by the clerk whilst it was in his office. The certificate dated March 8, 1853 has no relation to the return of the list. It is the mere attestation or certificate of the clerk to the correctness of the copy of the list which he was called on to make and its date refers to the time of the attestation of the copy. The provision in the act as to the time of the return of the list to the clerk's office is at most, but directory to the officer and his failure strictly to comply with it is surely not an irregularity apparent on the face of the proceedings which could be permitted to defeat the title previously acquired by a purchaser at his sale.

6. The act of February 24, 1841, (Sess. Acts 1841, p. 28) § 99 under the

provisions of which and of the act of 1832 the sales in 1845 were made, simply directs the Sheriff to return a fair and distinct statement of his proceedings to the court, setting forth the tracts sold and the amount of the purchase money as well as those offered for sale and not sold for want of bidders; and the court when satisfied of the truth of the statement is to certify a copy to the auditor of public accounts, but no precise time is prescribed within which this is to be done, and the sheriff is to account for the nett proceeds of the sale in like manner as other public revenue. The purpose of this provision is easy to see. By § 99 (p 27) when the auditor sends the list of lands returned delinquent for taxes to the Sheriff for sale, he charges the Sheriff with the whole amount of the taxes and damages appearing due on such list; and the list of the lands offered and not sold is therefore to be sent to the auditor that he may be enabled to give the Sheriff credit for the taxes and damages charged on those not sold. It is a provision intended for the ease of the Sheriff in the nature of a fiscal arrangement to aid in the adjustment of the accounts of the collecting officer by the accounting officer of the government. No purpose is avowed and none is fairly interrible to provide an additional means by which the owner may know whether his land has been sold He knows that his land has been directed by the auditor to be sold for the taxes due upon it and the amount which it is his duty to pay to redeem it is the same whether purchased by a third person or bought in for the commonwealth for want of a bid The act of 1832 only required a list of the lands bought in for the commonwealth to be sent to the auditor, and this was to be done by Sheriff himself after the list had been verified on oath and certified by the court. And at all events the provision is but directory to the court or to the Sheriff, and the failure of either to comply with it for which the purchaser could be in no manner responsible should not be held to defeat the title acquired by him previously at the sale. And it may be added that if this had been pointed out in the bill, it might have been very easy for the defendant to show that the list had been in fact sent to the Auditor.

7. The notes appended to the list were merely explanatory. They ndicated that certain tracts in the list had been sold in 1840 (the preceding regular tax sale year) in the counties of Harrison, Lewis and Wood in which they were embraced before the formation of the county of Ritchie out of part of those counties, and having been so sold were bought in for the Commonwealth, were thus under the law liable again to sale in 1845 in the county of Richie in which they were then assessed. These notes were unnecessary but surely could do no harm. (See act of Feb. 24, 1841, § 98. Sess. Acts p. 28.)

8. The acts of 1832 and 1841 unlike the code of 1849, do not require separate lists of sales to private bidders and to the Commonwealth to be made out and certified. The act of 1832 blends both in the same list — The act of 1841 requires no list in terms but directs the Sheriff to make a fair and distinct statement of his proceedings setting forth as is all the tracts sold as those offered but not sold for want of bidders. The list returned in this case complies with the requirement of both acts. The sales made to Sleeth were in 1845, those of the same lands to the Commonwealth were in 1840.

The deeds from Lowther, the clerk, were properly acknowledged. The mere omission of the day of the month on which the acknowledgement was made in the deed for the part lying in Doddridge county, is not material. Such an omission has never been held to vitiate acknowledgment of a deed. This deed was dated on the 27th of October, 1847, was acknowledged in the same month and was admitted to record on the 22d day of April, 1848. Thus the deed was obtained from the clerk within six months after the expiration of the period of redemption, 7th Oct.,

1847, and within six months thereafter was recorded in the office of the court in which the land lay. The deed for the Ritchie county portion of the land was acknowledged on the 27th day of October, 1847, and was admitted to record in that county on the 3d Nov., 1847.

From the deposition of Middleton p. 28 and his deed p. 35, it appears that the 19,944 acres sold was part of a large body of about 48,000 acres of land which Middleton had contracted to sell to a company consisting of eight parties whom Moir and Hopkins were one; after the contract the parties had the same laid off into lots for the purpose of partition which was made by drawing lots: Moir and Hopkins were interested in the purchase from Middleton to the extent of 20,000 acres and one McCurley and William Slater had become interested with them; five of the lots were in the partition allotted to Moir and Hopkins, one to McCurley and three to Slater and by direction of Moir and Hopkins and McCurley, the whole nine were conveyed to Slater by Middleton and they amounted to 19,444 the quantity charged on the books, being so charged in one body according to the usage where different parcels are conveyed by the same deed to the samegrantee for one entire consideration and constitute one entire tract although for some temporary purpose, they may have chanced to be conveyed in different parcels. Upon every subdivision of lands however minute and for whatever purpose, to require all the parcels great and small to be entered severally on the lists although in the name of the same owner, would render the act utterly impracticable and incapable of of being carried into effect. Such has not been the practical construction placed upon it, and by the Court of Appeals of the State it has been decided that lands granted to the same person by several coterminous patents are to be regarded as forming one tract. *Overton's heirs vs. Davisson* 9 Gratt. 211, 224

Objection on this account surely comes too late after the expiration of two years, the period of redemption after the sale. If an irregularity, it is not one that is apparent on the face of the proceedings under which the purchaser claims title. Supp. p. 363 ⅔ 22.

The land was properly on the books of Ritchie county which was formed by an act passed Feb. 18, 1843. They could not have been assessed for the year in question in Doddridge county as that county was only formed by an act passed 4th Feb., 1845. The whole was properly assessed in the name of Slater notwithstanding his deed of the 1st of August, 1840, to Hopkins and Moir. The parties failed to have that deed recorded in Harrison county, so that the commissioner might have stricken off the lands conveyed to them from the quantity charged to Slater; and the law makes it the duty of the landholder to see that his land is properly assessed and provides ample means by which any improper charge against him or other error may be corrected. See acts of 1832, 1835 and 1841, *passim*.

No objection of this kind is alluded to on the bill which seeks relief on totally different grounds nor was it suggested in the court below or considered by the court. It surely cannot be heard now at the bar for the first time in this court.

C. BOGGESS,
GEO. H. LEE,
of Counsel for the Appellees.

CLARKSBURG, Dec. 24, 1867.

1 Issued

2 Breaking duty

3 Misrepresentation

with intent

and thereby [illegible]

[illegible]

amended Act

June 2 1857

changing

new Statement -

Result of examination

[illegible] consequent

upon misrepresentation -

A C